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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 581

CARL WHITSON,
Petitioner,

v.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
A CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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FIDELITY AND DEPOSIT COMPANY OF MARYLAND, A CORPORATION,

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PRELIMINARY STATEMENT.

The issue on the Petition for Writ of Certiorari herein is completely obscured by Petitioner's failure to present to this Honorable Court in a clear and concise manner the decision, or decisions, of the California Court which he desires reviewed. The issue is further beclouded by Petitioner's arguments on collateral matters.

In brief, Petitioner presents and argues matters which were fully and finally determined by the District Court of Appeal of the State of California in December of 1960 and in connection with which decision a petition for hearing was denied by the Supreme Court of the State of California on February 21, 1961. Clearly, the Petition for Writ of Certiorari is much too late with respect to matters embraced within and concluded by the decision of the

District Court of Appeal of the State of California filed December 28, 1960.

Following a trial on the merits, Petitioner appealed from a judgment of the trial court in favor of Respondent to the District Court of Appeal of the State of California. The judgment of the trial court was affirmed on this appeal by decision filed on December 28, 1960, with directions to the trial court to determine a reasonable attorney's fee for services on appeal and to add such fee to the principal amount of the judgment in favor of Respondent. A petition for rehearing by Petitioner was denied, and a petition for hearing by the Supreme Court of the State of California was denied on February 21, 1961.

Thereafter and on motion of Respondent, the trial court determined and awarded a reasonable attorney's fee to the Respondent for services on appeal, and pursuant to the mandate of the Appellate Court added such fee for services on appeal to the principal amount of the judgment. Petitioner appealed from this order awarding attorney's fees for services on appeal as well as from a subsequent order of the trial court directing the entry of judgment in favor of Respondent and against the surety on the appeal bond filed in the court below. The first order determining and awarding reasonable attorney's fees for services on appeal was affirmed by the District Court of Appeal of the State of California by decision filed July 19, 1962. Petitioner's appeal from the judgment in favor of Respondent and against the surety on appeal bond was dismissed.

Since Petitioner makes no reference to his appeal from the order of the trial court directing entry of judgment against the surety on the appeal bond nor with respect to the action of the Appellate Court in dismissing his appeal from that order, Respondent will make no further comment with respect thereto in this brief.

OPINIONS BELOW

The judgments and order of the trial court are unreported. The judgment of the trial court following a trial on the merits is printed in Appendix "A" hereto. It is to be noted that this judgment is dated March 4, 1960 and not March 2, 1960, as set forth in Petitioner's brief.

The entire order of the trial court determining and allowing attorney's fees for services on appeal is printed in Appendix "B" attached hereto.

The decision of the District Court of Appeal affirming the judgment of the trial court with directions to determine a reasonable attorney's fee for services on appeal and add the same to the principal amount of the judgment is reported in 187 Cal. App. 2d 751, 10 Cal. Reptr. 6, and is printed in Appendix "C" attached hereto. It will be noted as reflected by the official report that this decision was filed December 28, 1960; that petition for a rehearing was denied January 13, 1961; and the Petitioner's petition for a hearing by the Supreme Court of the State of California was denied February 21, 1961.

Finally, the decision of the District Court of Appeal with respect to Petitioner's appeal from the order of the trial court dated April 20, 1961 determining and allowing attorney's fees for services on appeal is reported in 205 A.C.A., p. 786. This decision is printed in Appendix "D" attached hereto. It is to be noted that this decision was filed on July 19, 1962; that a petition for rehearing was filed by Petitioner and denied on August 14, 1962; and that a petition for hearing by the Supreme Court of the State of California was denied on September 11, 1962.

QUESTION PRESENTED FOR REVIEW

Where a jury trial had been waived by the parties in the original action, is a litigant entitled, as a matter of right, to a jury trial on one supplemental issue pertaining to the amount of attorney's fees to be awarded for services on appeal, following affirmance with instructions to the trial court to determine such fees and add the same to the principal amount of the judgment?

STATEMENT OF THE CASE

On December 19, 1949, one Curtis, as contractor, entered into a written contract with a school district located at Long Beach, California, to construct a lunch room assembly building. On December 22, 1949, and in connection with such contract, Curtis requested Respondent to execute and furnish the performance and labor and material bonds required by law. At or about the same time Petitioner also requested Respondent to execute for and on behalf of Curtis the required bonds, agreeing to furnish Respondent with an "Agreement of Indemnity" in connection therewith. This agreement of indemnity was subsequently executed by Petitioner on February 17, 1950, and delivered to Respondent.

Curtis defaulted in the performance of his contract with the school district and failed to pay numerous claims of laborers, materialmen and subcontractors who asserted their claims against Respondent. Respondent advised Petitioner that these claims were being asserted. Respondent was required to and did employ counsel with respect to the processing of these claims, all of which were paid, save one, from funds held by the school district or contributed by Curtis.

The one exception was the claim of Harbor Boat Building Company for labor, materials, attorney's fees and costs which claim became the subject matter of a law suit against Respondent and which law suit was settled before trial for $2,500.00.

Further, in February, 1951, Petitioner instituted an action in the Los Angeles Superior Court against Respondent seeking declaratory relief with respect to his liability under the aforesaid agreement of indemnity. Respondent employed counsel to defend this law suit, and subsequently said action was dismissed for lack of prosecution.

The instant action was filed by Respondent to recover from Petitioner under the agreement of indemnity the sums paid out in the settlement of the Harbor Boat Building Company claim together with expenses, including reasonable attorney's fees, incurred in connection with all of the foregoing matters. After a trial on the merits, judgment was rendered in favor of Respondent and against Petitioner for the amount sued for plus reasonable attorney's fees in favor of Respondent incurred in connection with the instant action brought to enforce the provisions of the agreement of indemnity, which reasonable attorney's fees were expressly provided for therein. This judgment was affirmed on appeal by the District Court of Appeal of the State of California, Second Appellate District, by decision filed on December 28, 1960. (See Appendix "C".) It is to be noted that the judgment of the trial court in this respect was affirmed with directions to determine a reasonable attorney's fee for services on appeal and to add such fee to the principal amount of the judgment. After the filing of the remittitur on February 27, 1961, and on motion of Respondent, with notice to Petitioner, the trial court, on April 20, 1961 made its order determining and allowing a

reasonable attorney's fee for services on appeal. (See Appendix "B".) Petitioner appealed from this order, and the order was affirmed by the District Court of Appeal, Second Appellate District, on July 19, 1962. (See Appendix "D".)

A petition for a rehearing with respect to this last mentioned decision of the District Court of Appeal was denied on August 14, 1962; and a petition for hearing by the Supreme Court of the State of California was denied September 11, 1962.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

I. The Petition for Certiorari Comes Too Late with Respect to Matters Finally Determined by the Decision of the District Court of Appeal Dated December 28, 1960 and Reported at 187 Cal. App. 2d 751.

It has already been noted that the judgment of the trial court on the merits was affirmed by the District Court of Appeal of the State of California, Second Appellate District, on December 28, 1960. It is manifest from the official report of this decision (187 Cal. App. 2d 751, 759) that a petition for rehearing was denied January 13, 1961, and a petition for hearing by the Supreme Court of the State of California was denied February 21, 1961. Thus, we have a final decision of the California Appellate Court which fully adjudicated the rights of the litigants and which adjudication was not thereafter subject to further review by a state court. The judgment was final with respect to all matters embraced therein; one item only remained open and that was the determination of an ancillary matter, to-wit, a mandate by the District Court of Appeal to the trial court to determine and allow a reasonable attorney's fee for services on appeal.

Subdivision (c) of §2101, 28 U.S. Code provides that a petition for writ of certiorari shall be applied for within ninety days after entry of the judgment or decree by the state court. This ninety-day period begins to run when the state court judgment is final in the sense that the rights of the parties are finally determined. The test of finality of the state court judgment is whether the record shows that the order of the Appellate Court has in fact fully adjudicated the rights of the parties, and that the adjudication is not subject to further review by a state court. Where the order or judgment is final in this sense, the time for applying to the Supreme Court for certiorari runs from the date of the Appellate Court's order.

> *Department of Banking v. Pink*, N.Y. 1942, 63 S. Ct. 233, 317 U.S. 264, 87 L. Ed. 254, rehearing denied, 63 S. Ct. 850, 318 U.S. 802, 87 L. Ed. 1166.

In the case at bar, the rights of Petitioner and Respondent were fully, completely and finally determined by the order of the Supreme Court of the State of California dated February 21, 1961, which order denied Petitioner's petition for hearing with respect to the decision of the District Court of Appeal dated December 28, 1960. The time for applying for certiorari with respect to this decision of the California Appellate Court commenced to run on February 22, 1961 and expired ninety days thereafter. The petition for certiorari with respect to any matter embraced within that decision of December 28, 1960 is almost eighteen months too late.

Respondent mentions only in passing that the reasons advanced by Petitioner for allowing certiorari (see pages 8 and 9 of Petition) have no validity whatsoever. We will discuss the fourth alleged reason relative to jury trial

separately but all the others relate to matters which were embraced within the decision of the District Court of Appeal on December 28, 1960 and merit no consideration whatsoever.

Petitioner seeks to inject a federal question into the case by referring to the fact that the construction contract in connection with which Respondent's bonds were executed involved a public school lunch room. Petitioner concludes that the federal aid to school lunch program is involved. He cites no authority to support this proposition. The construction contract itself was entered into in 1949, and there is not a scintilla of evidence to support Petitioner's contention or suggestion. Indeed, the question of federal aid to school lunch program was not raised by Petitioner until after the denial by the Supreme Court of the State of California of his petition for hearing with respect to the decision of the District Court of Appeal of December 28, 1960.

Petitioner's second and fifth reasons for allowing the writ relate to the statute of limitations. Respondent submits that this does not involve a federal question. The question with respect to the statute of limitations relates to the provisions of §4206 of the Government Code of the State of California. This section is quoted on page 3 of the Petition herein. The California Appellate Court has squarely held that this section is a statute of limitations and nothing more (*People v. Continental Casualty Co.*, 118 Cal. App. 2d 133, 135), and it has also been held that a statute of limitations may be waived by the party entitled to assert the same (*Bohn v. Watson*, 130 Cal. App. 2d 24, 36).

Petitioner argues at page 7 of his petition that the District Court of Appeal of the State of California had held

that the provisions of §4206 of the Government Code of the State of California could not be waived, citing *Fidelity and Deposit Company of Maryland v. Claude Fisher Co., Ltd.*, 161 Cal. App. 2d 431, yet, says Petitioner, the very same justice who wrote the opinion in the last mentioned case held in *Fidelity and Deposit Company of Maryland v. Whitson*, 187 Cal. App. 2d 751 (the instant case) that the provisions of §4206 of the Government Code can be waived. Petitioner says that this is not equal protection of the laws. But there is nothing in *Fidelity and Deposit Company of Maryland v. Claude Fisher Co., Ltd.*, 161 Cal. App. 2d 431 that in any way deals with §4206 of the Government Code.

II Petitioner Was Not Entitled to a Jury Trial on the Issue of an Award of Reasonable Attorney's Fees For Services on Appeal.

The decision of the District Court of Appeal of December 28, 1960 affirmed the judgment of the trial court on the merits with directions "to determine a reasonable attorney's fee for services on appeal and to add such fee to the principal amount of the judgment."

A jury trial of the original action had been waived by both parties under the provisions of §631 of the California Code of Civil Procedure. Petitioner concedes such a waiver at the bottom of page 8 and at the top of page 9 of his petition. The trial court held that Petitioner had waived a jury thereby with respect to the ancillary step after judgment, namely, the determination and allowance of an attorney's fee for services on appeal. The District Court of Appeal affirmed this ruling of the trial court and held in its decision of July 19, 1962 that after there had been a waiver of the right to a jury trial of the main action, there is no right to a jury trial of an ancillary or supplemental issue such as was involved in the instant case.

Spaulding v. Cameron, 127 Cal. App. 2d 698, involved a similar situation. There the action was originally tried with both parties waiving a jury trial. On appeal, the judgment was affirmed in part and reversed in part with instructions. On the second trial, the defendant demanded a jury, and this was denied. On a second appeal, the court held that the defendant was not entitled to a jury trial.

In the case at bar, the matter to be determined by the trial court pursuant to the mandate of the District Court of Appeal was clearly ancillary or supplemental to the original judgment. The original waiver of jury trial was still applicable with respect to this ancillary proceeding.

CONCLUSION

It is respectfully submitted that there are no special or important reasons for the granting of certiorari in the instant case. There is no substantial federal question involved herein, and we respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted.

FRANK E. HORKA,
Attorney for Respondent.

Of Counsel:
MAURICE H. WALLBERT.

APPENDIX "A"

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In The
Superior Court of the State of California
In and For the County of Los Angeles

Transf. to Long Beach

No. 711,587

Fidelity and Deposit Company of Maryland, a Corporation,

Plaintiff,

vs.

Carl Whitson,

Defendant.

JUDGMENT

The above entitled action came on regularly for trial on February 11, 1960, and was continued for trial and was tried on February 15, 1960, and on February 16, 1960, in Department "G" of South Branch (Long Beach) of the above entitled Court, Honorable Beach Vasey, Judge presiding, without a jury, a jury having been expressly waived. Plaintiff appeared by its attorneys, Sims & Wallbert, by Maurice H. Wallbert, Esq., and defendant Carl

Whitson appeared in Propria Persona, and evidence both oral and documentary having been introduced and the case having been argued and submitted for decision, and the court having heretofore made and caused to be filed herein its written Findings of Fact and Conclusions of law, and being fully advised in the premises:

NOW, THEREFORE, by reason of the law and the findings of fact aforesaid, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That Plaintiff Fidelity and Deposit Company of Maryland, a corporation, have and recover of and from the defendant, Carl Whitson, the sum of FOUR THOUSAND FIVE HUNDRED TWENTY-NINE AND 05 100 DOLLARS ($4,529.05), together with interest on the sum of $2,500 at the rate of 7% per annum from April 25, 1958, or interest in the sum of $324.67, making a total judgment in the amount of $4,853.72, together with plaintiff's costs in the sum of $

The Clerk is hereby Ordered to enter this Judgment.

Dated this 4th day of March, 1960.

BEACH VASEY,

Judge of the Superior Court.

APPENDIX "B"

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In The
Superior Court of the State of California
In and For the County of Los Angeles

No. 711,587

(Transferred to Long Beach)

Fidelity and Deposit Company of Maryland, a Corporation,
Plaintiff,
vs.
Carl Whitson,
Defendant

ORDER AND JUDGMENT DETERMINING AND ALLOWING ATTORNEY'S FEES FOR SERVICES ON APPEAL, PURSUANT TO DIRECTION OF DISTRICT COURT OF APPEAL

WHEREAS, judgment was rendered in the above entitled action on March 4, 1960, in favor of plaintiff Fidelity and Deposit Company of Maryland, a corporation, and against defendant Carl Whitson, and entered on March 10, 1960, in Book 3906, at Page 145 of judgments, records of the above entitled court; and

WHEREAS, said judgment determined that plaintiff herein have and recover of and from defendant Carl Whitson, the total sum of $4,853.72; and

WHEREAS, thereafter and within the time allowed by law, defendant Carl Whitson appealed from said judgment and the whole thereof; and

WHEREAS, on December 28, 1960, the District Court of Appeal of the State of California, Second Appellate District, filed its Opinion and decision on said appeal, affirming the aforesaid judgment of the trial court in favor of plaintiff and against defendant Carl Whitson, and in addition thereto, directed the trial court to determine a reasonable attorney's fee for services on appeal to plaintiff Fidelity and Deposit Company of Maryland, and to add such fee to the principal amount of the judgment herein in favor of plaintiff; and

WHEREAS, the remittitur was received from the District Court of Appeal, Second Appellate District, of the State of California, in this case on February 27, 1961, and said judgment is now final in all respects; and

WHEREAS, the matter of the determination of reasonable attorney's fee for services on appeal to plaintiff herein came on to be heard on the 17th day of April, 1961, after notice of such hearing had been duly given to defendant Carl Whitson, before the Honorable Beach Vasey, Judge of the above entitled court, presiding in Department South C of the above entitled court, located at 415 West Ocean Boulevard, Long Beach, California, plaintiff Fidelity and Deposit Company of Maryland, appearing by Sims & Wallbert, by Maurice H. Wallbert, its attorneys, and defendant Carl Whitson appearing in Propria Persona; and evidence having been adduced, and the matter having been argued and considered and good cause appearing therefor;

The Court finds and determines that a reasonable attorney's fee for services on appeal to plaintiff Fidelity and Deposit Company of Maryland, a corporation, is the sum of $800.00.

NOW, THEREFORE, by reason of all of the foregoing, it is hereby ordered, adjudged and decreed, that there be, and there is hereby, added to the amount of the judgment heretofore rendered and entered in the above entitled action in favor of plaintiff Fidelity and Deposit Company of Maryland, and against defendant Carl Whitson, the sum of $800.00 as and for a reasonable attorney's fee to plaintiff for services on appeal, thereby making a total judgment in favor of plaintiff Fidelity and Deposit Company of Maryland, a corporation, and against defendant Carl Whitson, in the sum of $5,653.72, together with costs, as provided by law, and as heretofore entered on the judgment, together with interest on the sum of $4,853.72 at the rate of 7% per annum from March 4, 1960.

Dated this 20th day of April, 1961.

BEACH VASEY,

Judge of the Superior Court.

APPENDIX "C"

In The
District Court of Appeal of the State of California
Second Appellate District
Division One

Civil No. 24869

Fidelity and Deposit Company of Maryland, a Corporation
Plaintiff and Respondent,
vs.
Carl Whitson,
Defendant and Appellant

Filed December 28, 1960

APPEAL from judgment of Superior Court of Los Angeles County, Beach Vasey, Judge.

Maurice H. Wallbert for respondent.

Carl Whitson, in propria persona, for appellant.

Plaintiff's action sought to recover from defendant, as indemnitor under a contract of indemnity, the sum of $3,529.05 plus interest, reasonable attorneys' fees and costs. Of this sum, $2,500.00 represented monies paid by plaintiff as surety in compromise and settlement of a claim asserted under a labor and material bond executed on a construction job for the Long Beach Unified School District; the balance consisted of $1,000.00 paid by plaintiff to its counsel for services rendered in connection with matters said to have been covered by the contract of indemnity, and $29.05 expended in court costs. The trial court rendered judgment as prayed for, together with an additional award

of $1,000.00 counsel fees for maintaining the instant action. Defendant has appealed from the judgment; plaintiff asks this court, in the event of an affirmance and pursuant to a pertinent paragraph of the contract, for an order awarding attorneys' fees on appeal. (*California Viking Sprinkler Co. v. Cheney*, 182 Cal. App. 2d 564, 571 [6 Cal. Rptr. 197].)

The salient facts, either admitted by defendant or otherwise found to be true, are as follows: On December 19, 1949, one Curtis, as contractor, entered into a written contract with the Long Beach Unified School District to construct a lunch room assembly building at a named Long Beach elementary school; on December 22, 1949, and in connection with such contract, Curtis requested plaintiff to execute and furnish the performance and labor and material bonds required by law (Govt. Code, Secs. 4200 et seq.); at or about the same time defendant also requested plaintiff to execute for and on behalf of Curtis the required bonds, agreeing to furnish plaintiff with an "Agreement of Indemnity" in connection therewith, which agreement was subsequently executed by defendant on February 17, 1950; following his entry upon the job contracted for Curtis neglected to pay numerous claims of laborers, materialmen and subcontractors who, in due time, asserted their claims against plaintiff; defendant was advised by plaintiff that these claims were being asserted; plaintiff was required to, and did, employ counsel with respect to the processing of the aforesaid claims, all of which were paid, save one, from funds held by the school district or contributed by Curtis; the one exception just mentioned, that of Harbor Boat Building Company for labor and materials (plus attorney fees and costs), became the subject matter of a lawsuit and was settled before trial for $2,500.00, for which sum (and counsel fees in connection therewith) this action seeks reimbursement. Finally, the following matters alleged in the complaint were admitted by the failure of defendant to deny: On February 27, 1951, defendant instituted an action against plaintiff seeking declaratory relief respecting his liability under the "Agreement of Indemnity"; plaintiff (as a defendant in said action) employed counsel to represent it and became obligated to

pay reasonable attorney's fees; on motion of plaintiff, said action was subsequently dismissed for lack of prosecution.

Appellant's briefs are in the nature of a "shotgun" attack on the judgment below; contrary to settled principles of appellate practice, they have placed an undue burden on this court to ascertain the exact points contended for; we have determined, however, that appellant basically is claiming that the evidence is insufficient to support the various findings of the trial court. The claim is without merit. In the discussion which follows, we shall give our reasons for the conclusion reached, touching upon such of appellant's points as require comment.

The evidence amply supports the finding that an indemnity agreement was executed and delivered by appellant to respondent. Robert Hecht, employed by respondent for approximately thirty-three years, testified that he and a fellow employee met appellant at a Long Beach used car lot, then operated by appellant, about one week before the bonds on the school job were executed; they told appellant that their employer was reluctant to proceed "without his (appellant) being in the picture"; appellant stated then or later (but prior to the execution of the bonds) that he would furnish an indemnity agreement to respondent on the particular project; Mr. Hecht also testified that respondent would not have executed the bonds except for appellant's promise in this connection. The agreement itself was introduced into evidence; it bears the signatures of appellant and Curtis, dated February 17, 1950, the signatures being acknowledged before a notary public the same day. Shown the original court file in the declaratory relief action filed by him against respondent, appellant testified that he signed the verification in blank (as was his practice when he was a party to a lawsuit); his attention was directed to paragraph VII of the complaint therein reading as follows: "At the time of the execution of the faithful performance bond mentioned in paragraph VI

[1] Appellant is a licensed member of the Oklahoma Bar although he never practiced in that state; he never sought admission to practice in California.

above, the defendant Fidelity & Deposit Company requested and obtained from plaintiff his agreement to indemnify said defendant from any loss that he might suffer as a result from being held liable on said bond"; as to the foregoing allegations, appellant stated: "I think they are generally true. I think the amount is true and I think that one is true." There was evidence that the agreement was returned by appellant to respondent, the face of the instrument bearing the imprint "Contract Dept. Feb. 27, 1950."

Appellant contends that there was no consideration for the agreement; he argues that the "alleged Agreement of Indemnity was signed and dated . . . about two months after the bond to pay labor and material was executed," hence consideration failed in that the indemnity contract was not executed simultaneously with the principal obligation, citing 42 C.J.S. 571, Sec. 6(2); further, he asserts, there was no compliance with Section 2793, Civil Code, providing that a surety obligation must be in writing. First, appellant's reference to Section 2793, *supra*, presumably is based on the oral understanding between the parties in December of 1949 pursuant to which the written agreement was entered into; since the oral guaranty was later acted upon and fully executed, the point is without merit. (*Solomon v. Ellis*, 34 Cal. App. 2d 672, 679.) Second, the rule cited by appellant (42 C.J.S. page 571, *supra*) also declares that a written agreement to indemnify need not be executed simultaneously with the contract indemnified if it be executed in pursuance of a prior agreement therefor. (*Fidelity and Deposit Co. of Maryland v. O'Bryan* (Ky.) 202 S.W. 645, 646, [cited by appellant]; *Title Guaranty & Surety Co. v. Packard Co.* (Wash.), 134 P. 812, 167 A.L.R. 1184-1185, citing generally *McDonough v. Chu Cheu Shong*, 21 Cal. App. 2d 257.) There is here, of course, evidence of a prior agreement pursuant to which the contract in suit was subsequently executed; if this fact were not sufficiently dispositive of the matter, it also appears that appellant neglected to plead lack or failure of consideration as an affirmative defense and he is now foreclosed from urging the question. (*Williams v. Kinsey*, 74 Cal. App. 2d 583, 603.)

Next the trial Court found that respondent suffered a loss, reimbursable under the provisions of the contract of indemnity, by the payment of the sum sued for; specifically, the court found that the compromise and settlement of the Harbor Boat Building lawsuit by payment of $2,500 was entered into in good faith and upon recommendation of its counsel and in the honest belief that respondent was liable to said claimant, that respondent paid its counsel $1,000 for services rendered in the processing of claims connected with the school job including the Harbor Boat Company settlement as well as the defense of appellant's declaratory relief action, and that such sum was a reasonable fee. An indemnity agreement is to be construed like any other contract with a view to determining the actual intention of the parties; no artificial rules apply. (*United Air Lines, Inc. v. Western Air Lines, Inc.*, 132 Cal. App. 2d 308.) The pertinent paragraphs of the contract of indemnity contain the following provisions: In paragraph Second, defendant agreed to indemnify and hold harmless the plaintiff from and against any and all loss, liability, damages, costs counsel fees, charges and expenses of whatever nature or kind which the plaintiff shall or may at any time incur, sustain or be put to for or by reason or in consequence of the execution of the bonds which were executed by plaintiff in connection with the Burnett Elementary School job; in paragraph Eighth defendant agreed to and did waive all notice of any default or any other act or acts giving rise to any claim under the bonds or of any liability on the part of the defendant as indemnitor under the contract of indemnity paragraph Tenth provided that in the event of any claim or demand made upon plaintiff by reason of the bonds referred to, or any of them, *plaintiff shall be at liberty to pay or compromise the same, and the voucher or other evidence of payment, compromise or settlement of any claim, demand, liability, cost, charge, expense, suit or judgment by reason of said bonds shall be prima facie evidence of the fact and of the extent of the defendant's liability as indemnitor* under the contract of indemnity to the plaintiff; paragraph Sixteenth provides, in part, that the plaintiff as surety *shall have a right* to apply to the

court in which any action might be brought against plaintiff as surety under the bonds in question for an order making the defendant, as indemnitor, a party defendant thereto; paragraph Seventeenth provides that the obligation evidenced by the contract of indemnity shall be liberally construed so as to fully protect and indemnify the plaintiff.

Respondent's draft, a photostatic copy of which was admitted into evidence by stipulation, established payment by respondent of $2,500 in settlement of the Harbor Boat Company lawsuit; a draft to the order of Joe Crider, Jr., respondent's attorney, in payment of $1,000 counsel fees and costs ($29.05), was likewise introduced into evidence by stipulation. Under the provisions of paragraph Tenth, the foregoing exhibits constituted *prima facie* proof of the fact of such payment and the extent of appellant's liability under the contract; these provisions, it appears, have the sanction of decisional law (17 C.J.S., Contracts, pp. 607-608, note 89) — indeed, there is authority supporting the validity of provisions that vouchers or other evidence of payment shall be *conclusive* evidence thereof upon a showing that payment was made in good faith. (42 C.J.S., Indemnity, p. 629, Sec. 35(c).) Mr. Crider, an attorney with some fifty years of experience in the field of suretyship law, testified that he could not see any defense to the Harbor Boat case: "I dickered with them and we didn't get any place." Appellant did not negative or rebut Mr. Crider's testimony on the question of good faith, and the evidence otherwise supports the finding that "said compromise and settlement was entered in good faith by plaintiff and upon the recommendation of its counsel in said proceeding and in the honest belief that plaintiff was liable to said claimant. . . ." Appellant makes the point that paragraph Sixteenth made it mandatory upon respondent to apply to the court where such action was pending for an order joining appellant as a party defendant therein; the pertinent paragraph did not *require* that respondent pursue such remedy although it had the right to apply for an order of joinder.

Further on the finding that respondent suffered a loss appellant argues that it was incumbent upon respondent to allege and prove that it was legally liable, that a judgment had been secured against it, the amount of such judgment or that the fact that the judgment had been paid. The law is to the contrary. An indemnitee is not bound to submit to suit before paying the claim; of course, if he pays without such suit, he must prove that he was liable for, the amount thus paid in order to recover from the indemnitor. (*Carpenter Paper Co. v. Kellogg*, 114 Cal. App. 2d 640, 651.) So, where there is no trial and no judgment establishing liability, but a settlement of the litigation has been made, the settlement becomes presumptive evidence of the liability and the amount thereof, which presumption is subject to being overcome by proof. (*Lamb v. Belt Casualty Co.*, 3 Cal. App. 2d 624, 631-632.) It was for the trial court to determine whether the presumption just mentioned was overcome in the case at bar; its determination in that regard, favorable to respondent, is binding on this court.

A determination of appellant's liability, or that of any other indemnitor, must nevertheless be controlled by the rule that a voluntary payment made by the indemnitee, without regard to its liability, is not recoverable. (*Southern Cal. Gas Co. v. Ventura Pipe Line Const. Co.*, 150 Cal. App. 2d 235, 257.) It is conceded that the Harbor Boat action was filed after the statute of limitations against respondent as surety (six months) had run (Govt. Code, Sec. 4206) and the plaintiff in that lawsuit was properly in court only because of a waiver of time (within which to sue) extended it by respondent through its attorney, Mr. Crider. There was testimony by Mr. Crider that numerous claims were asserted against his client as surety and that many of the claimants were threatening to file suit — in actions of this kind, Section 4207 of the Government Code provides for an award of attorneys' fees to the prevailing party. Mr. Crider testified that it was sound suretyship practice to extend time for the filing of suit on such claims in order to avoid lawsuits as well as the additional expense incident to attorneys' fees recoverable under the governing statute. Respondent, of course, had a duty to minimize the loss of its

indemnitor; furthermore, it seems that the wisdom of Mr. Crider's decision was demonstrated by the fact that all claims save that of Harbor Boat Company, were settled without the necessity of a lawsuit. Irrespective of the realities of the situation, Section 4206 is a statute of limitations (*People v. Continental Casualty Co.*, 118 Cal. App. 2d 133, 135) and may be waived by the party entitled to assert the same (*Bohn v. Watson*, 130 Cal. App. 2d 24, 36.)

Respondent properly maintains, in response to a contrary claim by appellant, that the present action was not barred by the four-year period embodied in Section 337, subdivision 1, of the Code of Civil Procedure. The four-year period commenced to run when respondent sustained its loss, namely, the payment of the sums herein sued for (*Globe Indemnity Co. v. Larkin*, 62 Cal. App. 2d 891, 894); the institution of the instant action was within that period.

Finally, as to the matter of attorneys' fees the contract of indemnity provided therefor, and the sole question before us is the reasonableness of the sum ($1,000) paid to Mr. Crider by respondent prior to the filing of the instant action and the additional award ($1,000) made by the trial court, for services in connection with the instant litigation. Mr. Crider testified as to the nature of the services rendered respondent: the processing of the various claims, extended negotiations for the settlement of the Harbor Boat Company lawsuit which represented a "potential loss of $6,148" and the defense of appellant's declaratory relief action. Where a trial court has fixed the compensation of an attorney, its determination in that respect will not be disturbed unless there is a plain and palpable abuse of discretion (*Kurland v. Simmons*, 126 Cal. App. 2d 79, 82) which, in the present case, has not been made to appear. Appellant's reliance on *Byron Jackson Co. v. Woods*, 41 Cal. App. 2d 777, is misplaced where there was a voluntary payment for defending a suit caused by the indemnitee's own wrongs; the case is factually dissimilar. As for the award of fees for the maintenance of the present action, appellant does not question that he is liable therefor under paragraph Second of the contract, but he does maintain that

the award is excessive. Again, the familiar rule is applicable that it is for the trial court to judge the reasonable value of legal services; the award of $1,000 was not unreasonable under accepted criteria applicable here.

As indicated in the opening paragraph of this opinion respondent is also asking this court, in the event of an affirmance, for an order awarding additional attorneys' fees on appeal. Paragraph Second of the contract provides for such fees, which provision is also applicable to services rendered on appeal. (*California Viking Sprinkler Co. v. Cheney, supra*, 182 Cal. App. 2d 564.)

The judgment is affirmed; the trial court is directed to determine a reasonable attorney's fee for services on appeal and to add such fee to the principal amount of the judgment.

LILLIE, J.

We concur:

WOOD, P. J.

FOURT, J.

APPENDIX "D"

In The
District Court of Appeal of the State of California
Second Appellate District
Division Four

Civil No. 25948
Civil No. 25949

Fidelity and Deposit Company of Maryland,
a Corporation,
Plaintiff and Respondent,

vs.

Carl Whitson,
Defendant and Appellant.

Filed July 19, 1962

APPEAL from two orders of the Superior Court of Los Angeles County. Beach Vasey, Judge. Affirmed.

Order awarding attorney's fees to plaintiff for services on appeal affirmed. Appeal from judgment against surety on undertaking dismissed.

Carl Whitson in pro per as Defendant and Appellant.

Maurice H. Wallbert for Plaintiff and Respondent.

Plaintiff Fidelity and Deposit Company filed an action against defendant Carl Whitson on an indemnity agreement and on March 4, 1960, judgment was rendered in favor of plaintiff for the sum of $4,853. Defendant appealed therefrom, filing an undertaking on appeal pursuant to

section 942, Code of Civil Procedure, in the penal sum of $10,000 executed by United States Fidelity and Guaranty as surety.

The District Court of Appeal affirmed the judgment and directed the trial court to determine a reasonable attorney's fee for services on appeal to plaintiff, and to add such fee to the principal amount of the judgment in favor of plaintiff. (*Fidelity & Deposit Co. v. Whitson*, 187 Cal. App. 2d 751, 759.)

On April 17, 1961, after notice to defendant, the trial court held a hearing and made a determination and award of reasonable attorney's fees for services on appeal to plaintiff in the amount of $800. On April 20, 1961, the court made its order awarding said sum of $800 as reasonable attorney's fees and adding this amount to the original judgment. Defendant appeals from this last mentioned order.

Plaintiff thereafter made written demand upon United States Fidelity and Guaranty Company for payment of the judgment on its undertaking on appeal, pursuant to section 942, Code of Civil Procedure; demand was also made upon defendant for payment of the judgment. Nothing having been paid, plaintiff then proceeded by motion for entry of judgment against United States Fidelity and Guaranty Company for the amount of the original judgment, plus interest, costs on appeal and the attorney's fees as allowed by the court. After a hearing on said motion, upon notice to defendant and the surety, judgment was entered May 5, 1961, in favor of plaintiff and against United States Fidelity and Guaranty Company, the surety on the undertaking on appeal, in the amount of $6,416. Defendant has also appealed from this judgment and the two appeals have been consolidated.

Appeal from award of attorney's fees.

Defendant first argues that the trial court had no jurisdiction to determine reasonable attorney's fees for services on appeal. The District Court of Appeal specifically directed the trial court "to determine a reasonable attor-

ney's fee for services on appeal and to add such fee to the principal amount of the judgment." (*Fidelity & Deposit Co. v. Whitson*, 187 Cal. App. 2d 751, 759.) That decision became final (petition for hearing by the Supreme Court was denied February 21, 1961) and was and is clearly the law of the case. Further, the appellate court in that case specifically held that the indemnity contract executed by defendant provided for attorney's fees for the indemnitee (plaintiff) and that this was applicable to services rendered on appeal. The court said (page 759): "As indicated in the opening paragraph of this opinion, respondent is also asking this court, in the event of an affirmance, for an order awarding additional attorneys' fees on appeal. Paragraph Second of the contract provides for such fees, which provision is also applicable to services rendered on appeal. (*California Viking Sprinkler Co. v. Cheney, supra*, 182 Cal. App. 2d 564.)"

Defendant next argues that at the hearing on the matter of attorney's fees, he requested a jury trial which was denied. In the trial of the original action both parties had waived a jury under section 631, Code of Civil Procedure. The court's ruling on defendant's objection to the jurisdiction of the court and his request for a jury trial, as shown by the transcript, is as follows:

> "(The Court) The objection on the ground of not being within the jurisdiction of the Court is overruled and the Court will rule that you have waived a jury in this proceeding and that you can't now claim a jury for this ancillary step after the judgment."

We approve the trial court's ruling that after the jury trial had been waived by the parties in the original action it could not be demanded as a matter of right for the trial of this one supplemental issue pertaining to the amount of attorney's fees to be awarded for services on appeal.

In *Spaulding v. Cameron*, 127 Cal. App. 2d 698, an action for an injunction and damages was originally tried with both parties waiving a jury trial. On the first appeal before the Supreme Court the judgment was affirmed in part and reversed in part with instructions. On the second

trial, defendant demanded a jury trial and this was denied. On the second appeal this ruling by the trial court was affirmed. The court said (page 703): "If the trial court on motion for a new trial had discovered its error and had granted a limited retrial for the purpose of adjudicating issues that had not been determined, or if after the evidence was closed the trial had been reopened for evidence as to the permanency of the nuisance, it could scarcely have been contended by the defendant that in the further proceedings he was not bound by his waiver of a jury. We see no substantial difference between the proceedings that were had pursuant to the mandate of the Supreme Court and proceedings that would have been had if the trial court of its own volition had reopened the case or had vacated its findings and judgment in part and had proceeded to determine the questions which it eventually did determine pursuant to the directions of the Supreme Court. It was not error to refuse the request for a jury trial."

In the instant case the issue was clearly ancillary because it could only arise after the appeal was determined. Further, the judgment in the main action was affirmed and there is here no retrial of an issue because of a reversal. We hold that after there has been a waiver of the right to a jury in the trial of the main action, there is no right to a jury trial of an ancillary or supplemental issue such as was involved in this case; the waiver as made originally is still applicable.

Where the trial court has fixed the amount of fees for legal services, its determination will not be disturbed unless there is a plain abuse of discretion (*Kurland v. Simmons*, 126 Cal. App. 2d 79, 82). The award made in this case of $800 as attorney's fees for services on appeal appears reasonable, is supported by the evidence and the record indicates no abuse of discretion whatsoever.

Appeal from judgment against surety on appeal bond.

This judgment was entered against the surety on the bond pursuant to section 942, Code of Civil Procedure, and not against defendant. The latter is not a party aggrieved

by it and no appeal therefrom may be taken by him (section 938, Code of Civil Procedure). For that reason such purported appeal should be dismissed.

Even assuming for the purposes of discussion that an appeal would lie, defendant's contentions on the appeal are without merit.

The judgment against the surety could have been made *ex parte* (see *Chas. F. Harper Co. v. DeWitt, etc. Co.*, 10 Cal. 2d 467, 469). Here, however, a motion was made and notice given to both the surety and defendant. Prior to the hearing, defendant wired from Oklahoma requesting a continuance of the hearing of the motion which was denied and of which denial defendant complains. We see no abuse of discretion by the trial court as such notice of the hearing was given to the surety and defendant by courtesy only. Under the terms of the undertaking on appeal the surety consented to the entry of judgment without notice.

Defendant further argues that the trial court had no jurisdiction to enter the judgment against the surety on the undertaking on appeal because previous thereto, the trial court had made its order regarding attorney's fees and defendant had filed his notice of appeal therefrom. Defendant argues that the appeal from the previous order divested the trial court of jurisdiction.

However, the appeal filed by defendant from the order determining reasonable attorney's fees, pursuant to the direction of the District Court of Appeal, did not divest the Superior Court of jurisdiction with respect to collateral matters; namely, matters not embraced within the subject of the order determining reasonable attorney's fees for services on appeal. (See *Neff v. Ernst*, 48 Cal. 2d 628, 633-634.)

The other points made by defendant have no merit and are not pertinent to the orders appealed from.

Plaintiff makes a request for additional attorney's fees for services on the present appeals. While the request has

merit, it will be denied in the interest of having the litigation finally terminated. However, in the event of further appeals or proceedings by defendant, it should be noted that this request by plaintiff is denied without prejudice.

The order awarding attorney's fees is affirmed; the purported appeal from the judgment against United States Fidelity and Guaranty Company is dismissed.

BALTHIS, J.

We concur:

BURKE, P. J.
JEFFERSON, J.